No. 2870

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

VACHON & STERLING, a Copartnership, etc.,
Plaintiffs in Error,

vs.

NORTHERN NAVIGATION CO., a Corporation,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

T. A. Marquam,
Louis K. Pratt,
Attorneys for Plaintiffs in Error,
Fairbanks, Alaska.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2870.

VACHON & STERLING, a Copartnership Firm, Composed of PETER VACHON and J. S. STERLING, Plaintiffs in Error, v. NORTHERN NAVIGATION COMPANY, a Corporation, Defendant in Error.

Brief of Plaintiffs in Error.

STATEMENT OF CASE.

On the 14th day of March, 1914, the plaintiffs in error filed a complaint in the Clerk's office of the District Court for the Territory of Alaska, Fourth Division, wherein they set forth two causes of action against the defendant in error based on accounts stated. In the first cause of action, as matter of inducement to the allegations of the statement of an account, it was alleged that in March, 1907, the defendant in error entered into a contract with the plaintiffs in error to transport for them by ocean and river steamers 1500 tons of merchandise from Seattle to Chena, Alaska, a town twelve miles southwest from Fairbanks, at the head of navigation on the Tanana River and the terminus of the Tanana Valley Railroad; by the fourth paragraph a failure to deliver 30 boxes of candles, 32 sacks of onions, 49 gunnies of flour, and 21 sacks of potatoes; a controversy over such loss of merchandise, and a statement of an account in July, 1908, adjusting the same at the sum of $853.99. The second cause of action was

the same, except that in the fourth paragraph the merchandise not delivered was 60 cases of eggs for which, at some time between March 16th and April 15th, 1908, an account was stated in the sum of $677.82. Shipments were made at different times during the open season of 1907, and the failure to deliver occurred in connection with different cargoes, which will explain the fact that there were two controversies and two adjustments.

Motions to strike substantially all of the fourth paragraph of each cause of action, and to make more definite and certain, were interposed, and the motion to strike was allowed on the ground that the recitals and details thereof were inappropriate in an action on accounts stated. (Record, pp. 3–12.)

The plaintiffs in error then filed an amended complaint omitting therefrom the parts stricken out, to which defendant in error again filed motions to strike and to make more definite and certain; but the Court overruled the motion to strike, and the other was waived. Next came a demurrer to the amended complaint on the ground that no causes of action were stated and that they were barred by the statute of limitations, but the last was not insisted on at the argument, the defendant in error relying on and the Court yielding to the authority of Vanbebber v. Plunkett (Or.), 38 Pac. 707; S. C., 27 L. R. A. (O. S.) 811. The demurrer was sustained, plaintiffs in error were denied leave to further amend, and the case was dismissed. (Record, pp. 12–24.) For the ground upon which the ruling was made see judgment. (Record, p. 22.)

ASSIGNMENT OF ERRORS.

The plaintiffs below and plaintiffs in error in the appellate court will rely for a reversal of the judgment against them in the said court on the following errors occurring during the progress of the trial, to wit:

1. The Court erred in sustaining the demurrer to plaintiffs amended complaint, interposed by defendant.

2. The Court erred in refusing to allow plaintiffs below to further amend their amended complaint after the Court had sustained a demurrer thereto.

3. The Court erred in its final judgment in adjudging that plaintiffs take nothing by their amended complaint, and dismissing their action and rendering a judgment in favor of the defendant and against the plaintiffs for the costs. (Record, p. 24.)

ARGUMENT.

At the hearing on the demurrer to the amended complaint, the theory of the defendant in error was, that the demands of plaintiffs in error, being founded on claims for unliquidated damages growing out of a failure by a transportation company to deliver merchandise in compliance with its contract, was not the subject of a stated account. The Vanbebber case above cited was accepted by the Court as the controlling authority.

The causes of action out of which the two accounts stated arose, as set forth in the amended complaint, were for breaches of contract by a carrier that had agreed to transport, during the open season of 1907, 1500 tons of merchandise from Seattle, and deliver

the same at Chena, Alaska, the violation consisting in a failure to deliver parts of two separate cargoes or shipments. Had Vachon and Sterling brought an action on their original causes of action, the measure of their recovery would have been referable to a known and fixed standard of comparison, to wit, the market value at Chena, Alaska, of the goods not delivered, less freight. The fact—if it was a fact—that they might have brought an action sounding in tort for unliquidated damages can make no difference; because it is well settled that the shipper can waive the tort, if one was committed, and sue on the transportation contract.

An action on contract for damages against a carrier arising from a breach for failure to deliver, where the measure of damages for goods lost would be the market value at point of destination, is one for liquidated rather than unliquidated damages, when viewed from the standpoint as to whether it did or did not furnish a basis for an account stated. The authorities say that interest can be recovered for the breach of a contract, where the amount of damages is capable of definite ascertainment by reference to market values of the property involved; and we maintain that the same rule should be applied here. The distinction made by the authorities is as between actions for damages where there is a fixed standard or measure of damages (i. e., market value), and those sounding wholly in tort, in which no fixed standard or measure of damages can be resorted to.

The books say that a claim is a liquidated one when either of the parties to the controversy can make it

definite and certain by computation. Vachon & Sterling, by a reference to the invoices, could by mere computation ascertain the cost price of the goods not delivered, also the freight paid thereon by the freight receipts, and, by adding legal interest, fix the amount due them from the Northern Navigation Company. Conceding, for the sake of argument only, that the claims of Vachon & Sterling were—in a very technical sense—unliquidated demands in their inception, they yet became liquidated by the agreement of the parties which resulted in the accounts stated; and in reason this ought to be the holding. The tendency of modern decisions on this subject sustains this view.

We contend that any controversy between parties arising out of monetary transactions is the subject of an account stated which may be sued on as such; but we are not compelled to secure the approval of this contention, in order to succeed on this writ of error.

1 Cyc., pp. 364, 365, 366;
1 Am. & Eng. Enc. Law, pp. 440, 441;
3 Enc. Pldg. & Prac., p. 818;
21 Enc. Pldg. & Prac., p. 1023;
2 Bliss on Code Pl., secs. 13, 14;
2 Sutherland on Damages, sec. 347; 3 Id., sec. 918.
Oberndorfer v. Mayer (Utah), 84 Pac. 1102;
Sawyer v. Robertson (Mont.), 28 Pac. 456;
Terry v. Munger (N. Y.), 24 N. E. 272.

The "Vanbebber" case is distinguishable from the one at bar. When the Northern Navigation Co. failed to deliver Vachon & Sterling's goods at Chena, the relation of debtor and creditor immediately came

into existence between them, the amount of which was the market value of the merchandise lost, at the time and place of delivery—less freight. In the Vanbebber case, Plunkett agreed to build about three-fourths of a mile of fence for Vanbebber, 60 to 80 rods of which was to be of boards and the remainder of what is commonly known as a worm fence. Plunkett failed and neglected to build the fence, and Vanbebber employed Mays to construct it for which service the latter was paid $300 by Vanbebber. Afterward, Vanbebber and Plunkett met in Corvallis, Oregon, talked the matter over, and Plunkett agreed to repay Vanbebber the $300. The action was on account stated, to recover the $300. At the trial Vanbebber was nonsuited, and on appeal to the Supreme Court of Oregon the judgment of the lower court was affirmed. The doctrine of the opinion is, that Vanbebber's cause of action for damages for a breach of contract to build a fence was not for a debt in the restricted sense, but rather was one for unliquidated damages, uncertain in amount and not capable of being made certain by reference to a market value or other known and accepted standard of comparison—and therefore was not the basis of an account stated. The significant fact that the parties themselves made it certain by agreeing that it should be $300 seems to have been ignored altogether. The opinion is too technical; and, besides, it is not sustained by the weight of authority, as is shown by the notes appended to the report of the case in the volume of L. R. A. above cited.

We think the ruling of the trial court on the demurrer to the amended complaint was clearly wrong, and should be reversed.

Respectfully submitted,
THOMAS A. MARQUAM and
LOUIS K. PRATT,
Attorneys for Plaintiffs in Error.